BRITISH COLUMBIA EXPROPRIATION ASSOCIATION

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ANNUAL CASE UPDATE AND REVIEW

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I. COMPENSATION

Shell Canada v. B.C. Transit (E.C.B. October 20, 2005)

- Injurious affection was the only issue following settlement of the claims for market value of the SRW, value of temporary SRW and business losses during construction;
- Number of factors contributed to negative impact on market value of the remainder:
  - SRW encroachment over existing service station canopy and underground fuel storage tanks;
  - SRW terms – Board relied on own decision in *Holdom* respecting broad rights conferred – development of future transit facilities – Transit could withhold permission for activities proposed by owner on SRW area – SRW imposed additional design and construction costs on redevelopment, possible reduction in building area;
  - columns and guideway on property reducing visibility, impacts in access and traffic flow on site;
  - uncertain location of future transit line;
  - change in OCP to multi-family residential creating uncertainty in any potential re-development.
- In considering the impacts of the columns on visibility, access and traffic flow the Board found that Shell's business performance after construction was irrelevant. But surely a prudent purchaser would want to know what impact, if any, the physical constraints had on sales. More to the point would not Shell, as the prudent vendor, be bound to downplay the physical effects by pointing out the unchanged sales volumes as evidence the value of the site as a gas station was little affected?
- The Board's acceptance of the OCP change to multi-family residential as a component of the injurious affection is difficult to reconcile with its acceptance of the claimant's appraiser's opinion that the Hughes and Best Use after the taking was long term holding for multi-family residential use. The Board concluded that the existing use as gas station would continue for a period of close to 10 years. How does changing the OCP to a land use designation consistent with the *after* Highest and Best Use create greater development uncertainty? Only if the Highest and Best Use after, had been commercial use would the multi-family residential OCP designation been problematic;
- The case also demonstrates the problem where only the claimant's appraiser states that there is injurious affection. Transit's appraiser had concluded there was no injurious affection. When the Board had to decide whether to accept the somewhat arbitrary 25% reduction advanced by the Claimant's appraiser it disposed of the contrary position by stating that Transit's appraiser had not provided any evidence of assistance. When dealing with percentage estimates of injurious affection that have an undeniable arbitrary element to them, the Board also has the option of selecting a percentage reduction somewhere between the claimant's number and the "zero" offered by the taker.

Talisman Energy Inc. v. Fay and Fay (E.C.B. February 10, 2006)

- Owners continued their objection to ECB having jurisdiction to no avail.
- Compensation for pipeline SRW determined at 50% of market value – $400.00 per acre for cultivated farmland – total award for one-half acre affected by SRW was $98.00.
- Owners presented no evidence as to value and instead unsuccessfully argued the ECB should assess compensation on rental basis.
- Board held it was required to determine compensation for the interest on the land acquired by the SRW and could not determine rent.
- Board proceeded on affidavit evidence and written submissions, much like a Rule 18A summary trial. Expect to see more of this with the transfer of ECB's jurisdiction to the Supreme Court.
- Despite $98.00 award and not having led any contrary evidence on value the Board ordered that the owners were entitled to their costs. The Board's justification was simply to note that in *B.C. Gas v. Landsall and Home Oil Cov. Schulte*, both of which involved expropriations under the *Pipeline Act* and *Railway Act*, the Board had held the owners were entitled to their costs. It is unlikely that the Supreme Court will be as forthcoming in awarding costs to an owner in a similar case where such a small amount is at stake.

Al's Auto Wrecking Ltd. v. City of Surrey (E.C.B. February 22, 2006)

- Related Company as Owner – Al's Auto Wrecking was the owner of the expropriated lands. A-Central, owned by the same principals as Al's, used part of the property for vehicle storage. Board concluded, applying the analysis in *Accton Petroleum*, that A-Central had an irrevocable licence to use the lands and was an owner by virtue of its possession or occupation of the land. Board allowed late amendment of the Form A to add A-Central as a claimant. The entire discussion was rendered moot by the Board's later conclusion that no disturbance damages would be awarded in relation to a business that could not be lawfully conducted on the lands.
- Highest and Best Use must be Lawful – S. 33 (6) – The auto salvage operation was carried out in part on lands that were not zoned for auto salvage. There is a good discussion of the case law surrounding the limited discretion to deny injunctive relief once a breach of zoning has been proved. The Board determined that the Highest and Best Use was holding for future industrial use as the existing use was an unlawful one, capable of being restrained by a court.

- Disturbance Damages for Business that was not a Legal Use – Board accepted Surrey's argument that it would be contrary to public policy to award disturbance damages for business loss arising out of an unlawful use. While s.34 did not contain an express proscription respecting unlawful uses similar to s.33(b), disturbance damages must be "reasonable" costs, expenses and losses and this permitted the Board to read in a similar limitation. No estoppel could be raised against Surrey from any acquiescence or encouragement by municipal officials as the claimant was aware of the zoning limitations. In any case the test for raising an estoppel against a municipality is quite restrictive.

  Despite the conclusion that no disturbance damages could be awarded the Board went ahead and addressed whether it was not feasible to relocate (the Board said it was feasible and claimant had not pursued an obvious opportunity) and attempted to quantify the lost profits.

  In the end the award was only 88% of the advance payment but the claimant was awarded costs given the complexity of the issues and the relatively late amendment of the Form B to raise the issue of unlawful use.

Sequoia Springs West Development Corporation v. MOTH (E.C.B. March 20, 2006)

- Board reconsideration of compensation for costs thrown away following on claimant's partial success at Court of Appeal.
- Board would not permit evidence on costs thrown away for work done on remnant lands or cost of overpass construction as being beyond scope of Court of Appeal order.
- "Reid" plan of golf course layout prepared specifically for hearing accepted by Board as claimant had never had plan prepared before the taking. Board dismissed MOTH's objection to use of Reid plan as only available plan of what was in progress at the time, that MOTH had agreed to introduction of additional evidence on the reconsideration and MOTH's own expert had utilized it in his evidence.
- Claimant's methodology – Take gross costs for machine rental and wages and determine percentage of total work thrown away on work on golf course within taking area and for "remedial work " on the remnant land (which was denied by the Board – para. 52).
- MOTH's methodology – Determine cost of construction – clearing, grubbing, grading and bulk earthworks – for the whole of the property and then determine, from one of three calculations, the percentage of costs thrown away.
- Equipment Rate – Board accepted Provincial Blue Book rates as the benchmark for assessing whether claimant's rates were reasonable. Claimant's rates not reasonable and reduced by one-third.
- Equipment Hours – Board accepts MOTH's expert's analysis that reasonable time budgets for the work were between roughly 35% and 50% lower (depending on the equipment) than the claimant's amounts.

  Board also rejected in its entirety any claim for equipment usage thrown away after s.3 agreement signed, noting evidence that claimant had stopped all work.

- Wages – Board applied wholesale reductions to claim for claimant's principal for excessive hourly rate for "foreman's work" ($70.00/hour to $40.00/hour) and for one-half of hours related to non-recoverable executive time. Second largest wage claim disallowed as already determined by previous Board decision.

  Board provides reconciliation of the claims based on deductions to the amounts asserted by the claimant with the costs calculated by MOTH's expert and finds only $12,000.00 spread. Board uses three different methodologies respecting MOTH's cost estimates:

  (1) Gross per hectare charge for clear and grubbing on land taken,

  (2) Recovery for preliminary grading based on percentage of cleared and grubbed area on taken land as to whole of area cleared and grubbed (15.7%), and

  (3) rough estimate of earthworks on taken area multiplied by average cost per hectare of earthworks outside taken area less 50% deduction for work done after the taking based on the sand and gravel "proxy."

- End result - $114,000.00 recovered as against $1.1 million claimed. Although Sequoia's claim suffered from certain excesses on the amounts claimed for equipment rates and wages, perhaps its major problem was that its financial and accounting records had not been maintained in a way that facilitated a breakdown in relation to specific activities or by particular time periods, a point that was frankly conceded by the claimant (para. 43). One can understand why a developer though would not maintain its records with a view to an expropriation that may not take on precise definition until the majority of the expenses have been incurred.

- Leave to appeal has been granted on the issue of what amount the 5% additional interest under S.46 (4) should be calculated on – the whole of the compensation award or the much smaller amount of the difference between a later advance payment (for disturbance damages/costs thrown away) and the Board's award.

Morris v. HMTQ 2006 BCSC 1043

- Valuation of mineral claim in Wells Gray Provincial Park expropriated in 1989

- Discussion of the "scheme" – Court concluded there was no evidence that the amendments over the years to the *Park Act* and *Mineral Act*, dealing with matters such as the issuance of resource use permits, had any impact on value. Court declined to follow ECB's approach on Casamiro of adding 25% to sales price to reflect different status under legislation (recreation area vs. Class A park) without evidence to support such an adjustment.

- Appraised Value Method – Court notes defendant expert's testimony that this valuation method should provide consistent results but did not in this case with plaintiff's expert claiming $822,000.00, while defendant's expert considered value only $75,000.00. This method involves estimating value of past exploration expenditures together with an estimate of costs for future warranted expenses. Court rejected plaintiff's valuation for failure to discount long ago exploration expenses and for being overly optimistic on considering the future potential of exploration expenses.
  - Plaintiff's expert evidence of post-valuation date exploration work found inadmissible.
  - Defendant's expert's opinion preferred that remote location, lack of any exploration work for 50 years, and small size of claim and questionable amounts of grade and ore amounts meant little potential for future expenditures.
- Comparable Transaction Method – Use of this method hampered due to lack of any true comparables. Court critical of failure of plaintiff's expert to keep working papers on his valuation of comparables: "I have difficulty understanding why any expert would not keep their working papers in these circumstances." Neither expert's valuation based on comparable transaction found to be helpful.
- Court awarded $125,000.00 on basis that defendant's expert's opinion "closer to the mark."

Holdom v. B.C. Transit 2006 BCCA 282

- Confirms the standard of appellate review is correctness on questions of statutory interpretation and that on issues of fact or mixed fact and law, the standard is reasonableness; the same standard of review on ordinary civil litigation.
  - Highest and Best Use – CA rejected argument there was no expert evidence that would support a Highest and Best Use other than the existing gas station. The test is whether there is any evidence to support the Board's conclusions. Although the claimant's appraiser was of the opinion the Highest and Best Use was the existing gas station, the CA found supportive evidence in the testimony of the marketing expert that the station would have been likely re-developed.
  - Re-zoning prospects – "marginally probable" (the phrase used by the Board) equates to slightly more probable than not, meeting the *Farlinger Developments* formula.
  - SRW language – CA found no error in Board's conclusion that the future rights conferred on Transit would create uncertainty in the minds of prospective purchasers and thus have an effect on market value.
  - Contiguous properties – CA upheld award for injurious affection to parcel owned by Chevron over which the SRW was not registered. Chevron's leasehold interest on adjacent parcel met test of s.40(6) – Contiguous parcel/unified ownership.

Toronto and Region Conservation Authority v. Gadzalla - Ontario Superior Court, Divisional Court [2006] O.J. No. 1635

- Expropriations of residential and motel properties by Conservation Authority for linear park and by City for local park.
- Municipal Board had identified two "schemes" and found that authority's appraiser had failed to screen out effects of the Conservation Authority's scheme.
- Standard of review of OMB decision was reasonableness as pure questions of law.
- Motel properties had earlier given bonus density transfer on anticipation of dedication of parkland and recognized by earlier OMB decision as "compensation."

- Authority argued that value of bonus density transfer should be removed from market value of land, otherwise owner would be over-compensated. Divisional Court upheld OMB's rejection of this argument; while earlier OMB panel referred to density transfer it expressly recognized compensation for recent expropriation would be dealt with separately by another OMB panel.
- Divisional Court rejected authority's submission that OMB had failed to give effect to the Conservation Authority's designation of lands as open space as not made with a view to acquisition but rather part of broader land use planning designed to achieve "balance" between open space and law density uses near water with higher densities away from water. Similarly rejected argument that OMB failed to screen out positive aspects of scheme (storm water management facility, park, waterfront road) that contributed to value.
- OMB's $4 million award of disturbance damages for delay was set aside. *Dell Holdings* was distinguished as there the claimant had development plans that were frozen by the pending expropriation, whereas these claimants did not:

  > While disturbance damage awards are not limited to circumstances where there is a pending development application, the facts must support a finding that the Claimants intended to use the land for a specific business purpose but were prevented from doing so for a period of time due to the expropriation process. Here, the Claimants were not developers, did not list their properties for sale, did not negotiate with the many prospective purchasers who tendered offers and did not submit a development application. They continued to operate the motels on their properties and asked for a Hearing of Necessity at the time of the City expropriation.

- In addition the Divisional Court found error by the OMB in attributing the entire period of delay to the expropriation process when there was a comprehensive land use planning process underway over most of the same ten year period. Further on causation, there was no evidence that the claimants could not have sold their lands to a prospective developer or developed the lands themselves.
- OMB's award of $1.85 million for lost opportunity to dedicate lands as park and obtain parkland credits in that amount was overturned. Loss of the ability to dedicate the land as park and earn parkland credits was inconsistent with the highest and best use for high density residential and there was no evidence that the market value would be increased due to the potential for park dedication/parkland credits;

- OMB also erred on causation in awarding disturbance damages for loss of parkland credits. Other owners that earned the credits had dedicated lands to the City, whereas the claimants had opted to receive market value of the land on expropriation and not dedicate.

II. PROCEDURE

Rainbow Estates v. Whistler (E.C.B. October 31, 2005)

- Res Judicata – In an earlier challenge to a 1987 expropriation which went to the Court of Appeal, a settlement agreement had been upheld which settled the date for determination of compensation as August 31, 1987. Board rejects Rainbow's attempt to set date for determination of compensation as February 27, 1991, (date advance payment finally made) as being res judicata. Rainbow also argued Board retained discretion to not apply res judicata because Rainbow would be unfairly denied benefits at the Expropriation Act. Board held no unfairness would result from holding Rainbow to its agreement on the valuation date, noting that a similar argument about unfairness had been rejected by the Court of Appeal in 1990.

Rella v. Village of Montrose 2006 BCSC

- A number of procedural challenges were made to the expropriation of the fee simple for waterline and pump-house:
  - Posting of Notice – The owner's evidence was, he never saw the notice that was affixed to the door of a pump-house. Court held that there is no requirement that the posting be maintained for any period of time. Court noted that owner was also served with copy of the Expropriation Notice and that the short posting period had not affected anyone else entitled to notice.
  - Publication of Notice – Where the land expropriated is outside municipal boundaries publication of the notice in a newspaper is an alternative to posting on site and not an additional requirement.
  - Approval – AG denied owner's request for an inquiry on the basis that the expropriation was for a linear development. Authority need not wait for AG's response though before approval of the expropriation.
  - Purpose of Expropriation – Inconsequential difference on description of purpose between notice and bylaw had no effect on validity of expropriation.
  - Regularity of Special Council Meeting – Not all of statutory prerequisites for giving notice at special meeting were met. However, all council members attended. Court concluded evidence indicated council member impliedly waived statutory procedural requirements.
  - Area Taken/Bad Faith – No inference of bad faith from Village's decision to take Fee Simple as opposed to SRW, on earlier negotiating to place fencing at a point inside the eventual taking boundary or to not respond to the owner's questions about compensation.
  - S.51 Limitation – means what it says – no challenge to an expropriation will be entertained after vesting.

DKS & VW Ventures Corp. v. School District 34 (Abbotsford) 2006 BCSC 599

- Petitioner attempted to avoid ECB award that compensation was $147,728.00 less than the advance payments on basis that Transitional Regulation was not valid.
- The case involved the interpretation of two amending Acts – The *Expropriation Amendment Act* S.B.C. 2004, c.61 and the *Miscellaneous Statutes Amendment Act* 2005 S.B.C. 2005 c.2. The latter statute gave cabinet power to make regulations governing the transitional period where the ECB was being wound down.
- Court rejected the argument that the ECB was left without jurisdiction as of March 2005, when the Transitional Regulation took effect, two months before the ECB's decision that the petitioner had been overpaid.
- "As surely as sparks fly upward", something had to be done to deal with cases in the system. It was for the Legislature to decide whether to address the problem in the body of the *Expropriation Act* being amended or by regulation as it did. Transitional Regulation was valid, authorized by the amended statutes.

Van-Kam Freightways Ltd. v. Kelowna 2006 BCSC 118

- Challenge to an expropriation on the basis authority failed to deal with the unregistered interest of a lessee.
- Court applied *B.C. v. Schneider [1996]* BCJ No. 1977 (BCCA) to the effect that authority need not serve expropriation notice or any of the following documents on an owner whose interest is not registered; nor must an advance payment be made to such owner.
- Court declined to distinguish *Schneider* as limited to trust relationships.
- An appeal has been filed with the appellant seeking a five judge panel to address whether *Schneider* was correctly decided. Declined.

COSTS

Maddocks and Maddocks Farms Ltd. v. City of Surrey 2005 BCSC 1732

- Appeal from costs decision of former Chair of ECB.
- Applies standard of review from *Neill v. B.C.* (1996) BCCA that on factual issues on questions of costs the appellant must show fundamental error in principle or palpable or overriding error.
- Upholds decision to reject separate bills of costs for individual parcels where properties found to be part of single family farming operation.
- Any additional complexity arising from separate parcels and several highest and best uses was adequately reflected in assessment of legal and appraisal costs at highest scale.

- Rejects argument that because tariff under-compensated claimants denial of separate costs claims for each parcel would encourage multiplicity of proceedings:
  - single act of expropriation, single appraisal report,
  - to permit multiple claim proceedings in this context would have been a fundamental error on principle,
    - ie, no litigating in slices.
- Expert's retainer with client does not govern tariff entitlement,
  - although some appraisal work on access and special benefit issue completed prior to appraisal, it was still recognizable within units available under tariff.
- Appraiser's assistance of counsel on cross-examination of other appraiser also covered in Tariff item for preparation for hearing – again no fundamental error on principle shown.

Payless Gas Co. (1972) Ltd. v. MOTH 2006 BCSC 1431

- Likely one of the last costs cases under the pre-tariff regime.
- Amount in issue is not merely the difference between the advance payment and final award, as many of the expenses were incurred before the various advance payments were made.
- Ex-employee of claimant who testified at hearing entitled to re-imbursement as a third party witness, not as part of award for disturbance damages – but fees of $80.00 - $100.00/hour cut to $50.00/hour as no evidence of his area of work or expertise, and no evidence witness had overhead expenses.
- If some legal costs unpaid at hearing, doesn't make it a contingency fee agreement – contingency fee is no fee payable if case is lost.
  - but master willing to consider as a factor on assessing ultimate reasonableness, the possibility that the fee payable by the client might be less than the amount allowed.
- Duplication - significant reduction on recovery of business volunteers' fees due to duplication of work caused by change of valuators for unexplained potential conflict of interest (which wouldn't have been authority's responsibility in any event.)
  - first valuer's estimate of fee to finish report ($6,000.00 - $10,000.00) used to cut $25,000.00 from second valuer's bill of $33,000.00.
- On legal fees, master accepted some duplication not only reasonable but absolutely necessity in such a complex case – use of other lawyers for most part justified as being brought in to deal with particular issues.

- Recovery for report not entered in evidence to be governed by *Van Daele v. Van Daele* test: whether report never used or ruled inadmissible does not preclude recovery if reasonable to incur expense originally:
  - as to alleged absence of expertise (appraiser speaking to business valuation issues), party objecting to expense has onus of presenting evidence – but nothing "in inherently unreasonable about a report from real estate expert straying into aspects of business valuations."
- Hourly Rates – master not willing to accept maximum hourly rate limits set by ECB without understanding premise on which they were based – no more feasible or just to attempt to fix maximum rates for expropriation counsel and experts as for personal injury counsel and whiplash experts.
- Staff Charges – unless for legal assistant demonstrating some degree of professional expertise, expected to be subsumed within lawyers' overhead.
- Itemization of Services – "working on file" will excite suspicions of reviewer.
- Public Payer/Pot of Gold – Citing the taxing officer on *Lenjo v. Lenjo* – no deliberate padding of bills but extravagance and thoughtlessness – demonstrated in some degree by the concession of writing off $100,000.00 following MOTH's detailed review of the accounts disclosing duplication and errors.
- Overall reduction of 25% for work considered to be unnecessary.
- Added cost due to non-disclosure of client – Shell refused to provide the business valuers with records due to confidentiality concerns – authority not responsible for additional costs of valuers in preparing opinions.